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No. _____

# In the Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, GALE BOGENN, WILLIAM SHELL, PATRICK JORDAN, CHARLES MAHONEY, individually and on behalf of all others similarly situated; and THE DETROIT POLICE LIEUTENANTS & SERGEANTS ASSOCIATION,

*Petitioners,*

vs.

CITY OF DETROIT, a Michigan Municipal Corporation; COLEMAN A. YOUNG, Mayor; WILLIAM L. HART, Chief of Police; DETROIT BOARD OF POLICE COMMISSIONERS; and GUARDIANS OF MICHIGAN, DAVID L. SIMMONS, ARNOLD D. PAYNE, JAMES E. CRAWFORD, CLINTON DONALDSON, WILLIE JOHNSON, KENNETH M. JOHNSON, ALFRED BROOKS,

*Respondents.*

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT**

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## QUESTIONS PRESENTED

1. Whether the use of a racial quota by a municipal government should be reviewed under a standard of "reasonableness" as opposed to the traditional strict scrutiny standard of review applicable to all governmentally imposed racial classifications?

2. Whether it is permissible for a municipal government to impose a 50/50 racial quota for promotions from police sergeant to lieutenant where a collectively bargained nondiscriminatory merit examination process is already in place?

3. Whether a municipal government may impose a racial quota for promotion to achieve a specified percentage of black lieutenants equivalent to the general population rather than reflecting the percentage of black employees who would have been hired and promoted in the absence of past discrimination as shown by relevant labor market statistics?

4. Whether a municipal government that has successfully eliminated all discriminatory employment practices must limit the use of racial preferences to benefit only actual victims of past discrimination, or is discrimination in favor of black employees justified to redress wrongs committed by the police force against black citizens many years earlier?

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| QUESTIONS PRESENTED | i |
| TABLE OF AUTHORITIES | iv |
| OPINIONS BELOW | viii |
| JURISDICTION | viii |
| CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED | ix |
| STATEMENT OF THE CASE | 1 |
| A. Introduction | 1 |
| B. Description of Parties | 1 |
| C. Procedural History | 2 |
| D. Facts and Background | 3 |
| E. Decisions Below | 7 |
| REASONS FOR GRANTING THE WRIT | 9 |
| I. This Case Presents Pervasive Issues of Vital National Concern Relating to Racial Preferences in Public Employment | 9 |
| II. Judicial Review of Governmentally Imposed Racial Preferences is Characterized By Confusion and Conflict | 11 |
| III. The Decisions Below Conflict in Principle with *Bakke, Weber,* and *Fullilove,* and Squarely Collide with the Requirement that the Nature of the Violation Must Determine the Scope of the Remedy | 14 |
| IV. The Case is Ripe for Review and Presents a Fully Developed Record for this Court to Decide Appropriate Standards for the Remedial Use of Race in Public Employment | 22 |

CONCLUSION ..... 24

APPENDIX .....

Opinion Of The United States Court of Appeals For The Sixth Circuit ..... 1a

Certificate Of Public Importance By The Attorney General Of The United States ..... 46a

Order Denying The United States Of America Leave To Intervene ..... 47a

Petition For Rehearing And Suggestion Of Rehearing En Banc ..... 51a

Order Denying Petition For Rehearing ..... 77a

Dissenting Opinion From Order Denying Rehearing En Banc ..... 79a

Order of Judgment Affirming District Court ..... 83a

Opinion Of The U.S. District Court For The Eastern District of Michigan ..... 85a

Final Opinion Of The U.S. District Court ..... 235a

Judgment Of The U.S. District Court ..... 255a

## TABLE OF AUTHORITIES

**CASES** PAGE

*Baker v. City of Detroit,* 483 F. Supp. 930 (E.D. Mich. 1979) ..... viii

*Baker v. City of Detroit,* 504 F. Supp. 841 (E.D. Mich. 1980) ..... viii

*Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983) ..... viii

*Connecticut v. Teal,* 457 U.S. 440 (1982) ..... 19

*Dayton Bd. of Educ. v. Brickman,* 433 U.S. 406 (1977) ..... 18

*Detroit Police Officers Ass'n. v. City of Detroit,* 233 N.W.2d 49 (1975) ..... 2

*Detroit Police Officers Ass'n v. Young,* 608 F.2d 671 (6th Cir. 1979) ..... 4,7,22

*E.E.O.C. v. American Telephone and Telegraph Co.,* 556 F.2d 167 (3d Cir. 1977) ..... 12

*Firefighters Institute for Racial Equality v. City of St. Louis,* 616 F.2d 350 (8th Cir. 1980) ..... 12

*Franks v. Bowman Transportation Co.,* 424 U.S. 747 (1976) ..... 20

*Fullilove v. Klutznik,* 448 U.S. 448 (1980) ..... *passim*

*Hazelwood School District v. United States,* 433 U.S. 299, (1977) ..... 16,17

*Hill v. Western Electric Co.,* 596 F.2d 99 (4th Cir. 1979) ..... 12

*Int'l Brotherhood of Teamsters v. United States,* 431 U.S. 324 (1977) ..... 17,21

*Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420 (2d Cir. 1975) ..... 12

*Milliken v. Bradley*, 418 U.S. 717 (1974) ..... 17,19

*Minnick v. California Department of Corrections*, 452 U.S. 105 (1981) ..... 22

*NAACP v. Allen*, 493 F.2d 614 (5th Cir. 1974) ... 12,13,20

*Parker v. Baltimore and Ohio Railroad Co.*, 652 F.2d 1012 (D.C. Cir. 1981) ..... 12

*Regents of the University of California v. Bakke*, 438 U.S. 265 (1978) ..... *passim*

*Sledge v. J.P. Stevens & Co.*, 585 F.2d 625 (4th Cir. 1978) ..... 12

*Stotts v. Memphis Fire Dept.* (No. 82-229) ..... 11

*Swann v. Charlotte-Mecklenberg Bd. of Education*, 402 U.S. 1 (1971) ..... 17

*U.S. v. City of Chicago*, 549 F.2d 415 (7th Cir. 1977) ..... 12

*U.S. v. City of Chicago*, 663 F.2d 1354 (7th Cir. 1981) ..... 13

*U.S. v. City of Miami*, 614 F.2d 1322 (5th Cir. 1980) ..... 12

*United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) ..... *passim*

*Valentine v. Smith*, 654 F.2d 503 (8th Cir. 1981)... 12

*Williams v. City of New Orleans*, 543 F. Supp. 662 (E.D. La. 1982) ..... 11

*Williams v. City of New Orleans*, 694 F.2d 987 (5th Cir. 1982), rehearing *en banc* granted, 694 F.2d 998 (1983) ..... 11

**CONSTITUTIONAL PROVISION**

Fourteenth Amendment to the United States Constitution ..... *passim*

**FEDERAL STATUTES**

28 U.S.C. § 1254(1) ..... viii

28 U.S.C. §§ 1441 and 1443 ..... 2

42 U.S.C. § 1983 ..... ix,2,21

Title VII Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq* ..... *passim*

**LOCAL STATUTES**

Michigan Public Employee Relations Act, Mich. Comp. Laws Ann. § 423.201, *et seq* .... 2

Detroit City Charter, § 7-1103 ..... 2

Detroit City Charter, § 7-1114 ..... vi,2

**MISCELLANEOUS**

Brown, *Court-Ordered Racial Discrimination in "America's Finest City,"* 3 Lincoln Rev. 9 (1983) 10

Buzawa, *The Role of Race in Predicting Job Attitudes of Patrol Officers*, 9 J. Crim. Just. 63 (1981) .... 10

Equal Employment Opportunity Commission, *Eliminating Discrimination in Employment: A Compelling National Priority* (1979) ..... 13,20

Schlei and Grossman, *Employment Discrimination Law* (2d ed. 1983) ..... 9,21

Sowell, *Dissenting from Liberal Orthodoxy* (1976) ... 10

U.S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* (1981) ..... 9,21

U.S. Commission on Civil Rights, *The State of Civil Rights: 1979* (1980) ..... 9

Williams, *America: A Minority Viewpoint* (1982) ... 10

Wortham, *The Other Side of Racism* (1981) ..... 10

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on March 29, 1983 and issued as mandate on June 21, 1983.

## OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Bratton v. City of Detroit,* 704 F.2d 878 (6th Cir. 1983), and is reproduced at pages 1-45a of the Appendix hereto. The consolidated Memorandum Opinion of the District Court is reported as *Baker v. City of Detroit,* 483 F. Supp. 930 (E.D. Mich. 1979), reproduced at pages 85-234a in the Appendix. The final opinion of the District Court is reported at 504 F. Supp. 841 (E.D. Mich. 1980), set out in the Appendix at pages 235-254a.

The opinion and order of the Court of Appeals denying the petition for rehearing *en banc* and vacating in part the final order of the District Court is reproduced at page 77a of the Appendix, with the separate dissenting opinion from the order denying rehearing *en banc* at page 79a.

## JURISDICTION

The Court of Appeals decided and filed its opinion on March 29, 1983, and denied rehearing on June 3, 1983. By order of this Court entered by Justice White on August 8, 1983, the time for filing this petition was extended to and including October 1, 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1976).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this case are the Equal Protection and Due Process clauses, which provide in pertinent part:

> No state shall . . . deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provisions involved include 42 U.S.C. § 1983, as well as sections 703(a), (h), and (j), of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. §§ 2000e-2(a), (h), and (j) (1976) [hereinafter Title VII], providing in pertinent part:

> 42 U.S.C. § 1983
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
>
> 42 U.S.C. § 2000e-2
> (a) It shall be an unlawful employment practice for an employer —
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race . . .; or
>
> (2) to limit, segregate, or classify his employees or applicants from employment in any way which would deprive or tend to deprive any individual of employment

opportunities or otherwise adversely affect his status as an employee, because of such individual's race, . . . .

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of any intention to discriminate because of race . . . , nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race . . . .

(j) Nothing contained in this title shall be interpreted to require any employer . . . subject to this title to grant preferential treatment to any individual or to any group because of race . . . of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race . . . employed by any employer . . . in comparison with the total number or percentage of persons of such race . . . in any community, State, section, or other area, or in the available work force in any community, State, section or other area.

## STATEMENT OF THE CASE

### A. Introduction.

The Police Department of the City of Detroit consists of patrolmen, sergeants, lieutenants, inspectors, commanders, deputy chiefs, and ultimately the Chief of Police who is appointed by the Mayor. As of 1973, and possibly as early as 1968, the mechanism governing promotions from sergeant to lieutenant (a combination of merit examination and seniority factors) had no disparate impact on blacks, *i.e.*, blacks were being promoted to lieutenants at rates at least equal to their representation among promotional candidates in the sergeants ranks. Although for many years under-represented in the Detroit police force, by 1974, in part as a result of affirmative action recruiting efforts that began in 1968, blacks constituted approximately 11% of the sergeant ranks.

In 1974, the newly elected administration of Mayor Coleman A. Young imposed a strict 50/50 racial quota on, *inter alia,* promotions from sergeant to lieutenant. By order of the courts below, this racial preference is to remain in effect at least until 1990, and possibly longer, in order to reach an ultimate goal of black representation among the lieutenant group that mirrors black representation in the city population.

As a result of this racial quota, the black promotion rate to lieutenant was in 1974 and continues to be several times the promotion rate that would be expected with a racially neutral system. Black sergeants with lower examination scores than white sergeants are promoted to lieutenant solely because half of the promotional opportunities have been guaranteed to blacks. Petitioners challenge the decision of the Court of Appeals, which sustained the 50/50 quota in its entirety.

### B. Description of Parties.

Petitioners Bratton and other named individuals (Plaintiffs/Appellants below) represent a class of adversely affected

white male sergeants who, since November of 1975, have been or will be denied timely promotion to the rank of lieutenant solely because of their race. The Detroit Police Lieutenants & Sergeants Association is the exclusive bargaining agent and the signatory to the collective bargaining agreement with the City of Detroit, pursuant to the Michigan Public Employees Relations Act (PERA), Mich. Comp. Laws Ann. (MCLA) § 423.201, *et seq.*

Respondent Detroit Board of Police Commissioners (the "Board") is a five-member body appointed by the Mayor, Respondent Coleman A. Young. Under § 7-1103 of the Detroit City Charter, the Board establishes "policies, rules and regulations" for the Police Department "in consultation with" the Respondent Chief of Police, "with the approval of the Mayor." Respondent Guardians of Michigan is a minority organization which intervened as a Defendant shortly before trial.

**C. Procedural History.**

Petitioners commenced this action in a state circuit court in November, 1975. It was subsequently removed to federal district court pursuant to 28 U.S.C. § § 1441 and 1443. Interim injunctive relief was denied, and the quota has been applied throughout the litigation and continues to date.

As amended, the complaint alleges that the 50/50 racial quota for promotions from sergeant to lieutenant violates Title VII, 42 U.S.C. § 1983, and the Fourteenth Amendment to the United States Constitution.[1] The district court upheld

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[1] Pendent state claims not addressed below include violations of § 7-1114 of the Detroit City Charter and the collective bargaining agreement requiring merit examinations for promotions, as well as violations of the Michigan Public Employees Relations Act (PERA), MCLA 423.201, et seq. PERA imposes the obligation of good faith bargaining on all promotion standards and criteria as a term and condition of employment. See, *Detroit Police Officers Ass'n v. City of Detroit,* 233 NW 2d 49 (1975).

the quota, and incorporated the program into its final judicial decree. *See* Appendix at 255-261a [hereinafter App.]. The Sixth Circuit affirmed on March 29, 1983. On April 28, 1983, the United States of America, through the Civil Rights Division of the Justice Department, sought leave to intervene as a party appellant and to file a suggestion of rehearing *en banc*. The motion was denied on May 27, 1983, with Judge Merritt dissenting. (App. 47-50a).

The Sixth Circuit denied Petitioner's Motion for Rehearing and suggestion of rehearing *en banc* per Order dated June 3, 1983. The Order also vacated that part of the district court's final Order incorporating the quota into a judicial decree, and remanded for further consideration of the 50% quota in view of the 1980 census showing a Detroit black population of 63%. (App. 78a). Circuit Judge Wellford filed a separate opinion dissenting from the denial of rehearing *en banc*. (App. 79a).

**D. Facts and Background.**

The 50/50 quota on promotions to lieutenant was adopted by the newly-appointed Board of Police Commissioners in June, 1974, as part of a plan designed to remedy the Police Department's prior discriminatory employment practices and to meet what the Board perceived to be an "operational need" for more black police officers and supervisors. The 50% figure was based upon the racial composition of the general population of the City of Detroit in 1974. Joint Appendix on Appeal to the Sixth Circuit at 1237 [hereinafter J.A.]. Under the plan, the Police Department allocates 50% of all promotions to black employees at every rank and level of the Department.[2]

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[2] In the 1973 Mayoral race, candidate Coleman A. Young campaigned on a pledge to the voters of proportional representation between the City's work force and the population. (J.A. 1088). Accordingly, when the Mayor took office in January of 1974, his Chief of Police adopted as a top priority the implementation of a 50/50 racial hiring and promotional policy. (J.A. 1124-25).

This case, however, involves only promotions from sergeant to lieutenant since November of 1975.[3]

Prior to the imposition of the racial quota, all sergeants who were candidates for promotion to lieutenant were ranked on a single list according to numerical ratings based on various performance evaluation factors, including individual exam scores, oral board scores, educational attainment, seniority, and other factors. (App. 152a). Promotions were made in rank order from the resulting eligibility list of candidates. While the Department did not keep statistics by race prior to 1973, the district court found that "there is no question, however, that the 1973 and 1974 promotional examinations were not themselves discriminatory." (App. 153a). At trial, experts for both sides agreed that the 1973 eligibility list was racially neutral, and that subsequent promotional exams and resulting eligibility lists did not have any disparate impact against black candidates.[4]

The Sixth Circuit's opinion describes the operation of the 50/50 racial quota as follows:

> The plan mandates that two separate lists for promotion be compiled, one for black and the other for white officers. The rankings on those lists are then made in accordance with the same numerical rating system previously employed. The promotions are made alternatively from

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[3] The issue of promotions from patrolman to sergeant is currently pending in the district court upon remand in the related case of *Detroit Police Officers Ass'n. v. Young*, 608 F. 2d 671 (6th Cir. 1979), *cert. denied*, 452 U.S. 938 (1981). Unlike the facts here, *Young* involves an examination for promotions to sergeant which is alleged to have a disparate impact against blacks.

[4] The district court's conclusion that the pre-1973 promotional exams had a disparate impact on black candidates was inferred from the content of the pre-1973 written examinations. (App. 135–137a).

each list so that white and black officers are promoted in equal numbers. The 50/50 plan is to remain in effect until fifty percent of the lieutenant's corps is black, an event estimated to occur in 1990. (App. 4a).

Although the merit examination process was itself non-discriminatory, the 1975 Board cited the imbalance between the percentage of black police lieutenants as compared to the general population of the City of Detroit. The Board made no attempt to provide remedial relief on an individual basis, nor did it attempt to define the extent of such past discrimination through an analysis of the relevant labor market or labor pool, relying instead on general population figures to determine the 50% goal. (App. 25a). This effort to achieve a racial balance in the police department was acknowledged at trial by Chief of Police Hart, who conceded that the quota was not based upon particularized needs, but rather reflected "the mandate of the Mayor, the man in charge of the City." (J.A. 700).

The position of lieutenant is a specialized one, requiring several years of experience and well-developed skills. As a result, the relevant labor market is substantially narrower than the general population. At trial, the City's own expert[5] attempted to define the relevant labor market to determine racial disparities, if any, among the lieutenant ranks. (App. 139a). Based on an analysis of the relevant labor market as derived from a count of actual applications for employment with the Department, he estimated the number and percentage of black lieutenants that could have been expected in an environment free of discrimination in both hiring and promotions since 1945. As of June, 1978, his estimate was 49 black

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[5] Mr. Alan Fechter, who is incorrectly identified in the Court of Appeals opinion as "Appellants (Petitioners) own statistical expert, Mr. Alan Fechter". (App. 27a).

male lieutenants out of a total of 194 lieutenants, or 25%. (J.A. 1764). In fact, however, there were 41 black male lieutenants out of 194, or 21% by that date.[6] Fechter testified that this difference between the expected and actual number of black lieutenants in 1978 was not statistically significant. (J.A. 1044). The district court, however, concluded that this was a substantial difference justifying continued application of the quota well beyond 1978. (App. 143a).

The following table illustrates the increased numbers of blacks at every level of the Department since 1975. When the quota was implemented in November, 1975, blacks represented 22% of total department personnel and 6% of the lieutenant's ranks, down from 10% two months earlier (J.A. 1537) because a disproportionately high number of black lieutenants were appointed to the higher ranks of inspector and above (J.A. 1538).

**Racial Breakdown of Police Command Officers[7]**

| | Lieutenants | | Inspectors | | Commanders & Above | |
|---|---|---|---|---|---|---|
| | White | Black | White | Black | White | Black |
| 1975 — | 195 (89%) | 23 (11%) | 47 (84%) | 9 (16%) | 14 (64%) | 8 (36%) |
| 1976 — | 161 (90%) | 18 (10%) | 43 (74%) | 15 (26%) | 15 (58%) | 11 (42%) |
| 1977 — | 176 (78%) | 51 (22%) | 43 (66%) | 21 (32%) | 17 (63%) | 10 (37%) |
| 1978 — | 154 (78%) | 44 (22%) | 38 (60%) | 24 (38%) | 16 (53%) | 13 (43%) |
| 1979 — | 145 (77%) | 44 (23%) | 35 (59%) | 23 (39%) | 16 (55%) | 12 (41%) |
| 1980 — | 151 (73%) | 56 (27%) | 36 (58%) | 25 (40%) | 15 (54%) | 12 (43%) |
| 1981 — | 145 (73%) | 54 (27%) | 32 (56%) | 24 (42%) | 15 (50%) | 14 (47%) |
| 1982 — | 138 (72%) | 53 (28%) | 28 (54%) | 23 (44%) | 15 (54%) | 12 (43%) |
| 1983 — | 145 (70%) | 62 (30%) | 34 (54%) | 28 (44%) | 16 (52%) | 14 (45%) |

[6] This 21% figure does not include seven additional black female lieutenants in June, 1978.

[7] Source: Updated statistics submitted by order to the Sixth Circuit. Discrepancies between the number of lieutenants above and those set out in the Sixth Circuit's opinion (App. 17a) are the result of the Court's inclusion of Hispanic and Asian officers as "white", which were deleted in

*(footnotes continued on next page)*

**E. Decisions Below.**

The district court found that the selection rates of the competitive merit examination process had no disparate impact against black candidates for promotion since such statistics were compiled starting in 1973. (App. 153a). It also found that the racial classification creating two separate lists for promotion "is unquestionably a racial preference and unquestionably impacts against white officers." (App. 185a).

Nonetheless, it concluded that the City "acted reasonably when it adopted its affirmative action plan." *Id.* Extending its interpretation of *United Steelworkers of America v. Weber,* 443 U.S. 193 (1979) to the case of a public employer (App. 201a), the district court held that a broad "area of discretion" exists for employers to design and implement "voluntary" affirmative action programs. (App. 192a). The district court then concluded that the promotion quota was a "reasonable" effort to remedy the present effects of the City's past intentional employment discrimination, which did not cease until 1967-1968, when an affirmative action minority recruitment program was instituted by the Department. (App. 210-211a).[8]

The Sixth Circuit affirmed. Noting that "what is valid under [the Fourteenth Amendment] will certainly pass muster under Title VII" (App. 13a), the Sixth Circuit's analysis focused solely on the constitutionality of the Board's 50/50 promotion quota. The Court of Appeals considered itself bound by *Detroit Police Officers Ass'n v. Young, supra,* which dealt with a similar 50/50 quota on promotions from patrolman to

*(footnotes continued from previous page)*

the table above. These statistics are on file with the Detroit Police Department Statistical Section, and are published yearly in the Detroit Police Department Annual Report.

[8] The court also based its holding on Respondents' contention that the Department's "operational needs" justified imposition of the promotional quota for lieutenants. (App. 226-229a). In a separate final opinion,

*(footnote continued on next page)*

sergeant. (App. 10a, n. 26). The court relied on *Young's* "reasonableness" standard which, according to the Sixth Circuit, requires an examination of whether any discrete group or individual is stigmatized by the racial classification and whether racial classifications have been "reasonably used in light of the program's remedial objectives." (App. 13a, 20a). Applying this standard to the instant case, the Court of Appeals concluded that the 50/50 quota (1) did not unduly stigmatize anyone (App. 20a-23a), and (2) passed the "test of reasonableness." (App. 23a). The court found it "unnecessary to address the validity of the operational needs defense to affirmative action in this context." (App. 12a n. 30).

The Court of Appeals held that to the extent to which the 50/50 quota is excessive as a remedy for past discrimination in employment, it can be justified due to a prior "pattern of unconstitutional deprivation of the rights of a specific, identifiable segment of the Detroit population by white members of the segregated Police Department," and concluded that the "redress of this injury to the black population as a whole justifies a plan which goes beyond the. . . work force limitation which appellants imply may have been appropriate." (App. 31a). Judge Merritt, dissenting in part, argued that "the Fourteenth Amendment requires a more exacting standard than the open-ended mere 'reasonableness' stated by the Court." (App. 45a).

In its order denying rehearing, the court vacated that part of the district court's final order holding that the quota was constitutionally required at the 50% level, and remanded for reconsideration of the quota in light of the 1980 census showing a black City population of 63%. (App. 79a). Circuit Judge

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*(footnote continued from previous page)*

the district court incorporated the Board's promotional quota for lieutenants into a final and mandatory judicial decree, holding that the quota was constitutionally required until the 50% black end-goal was achieved. (App. 255a-261a).

Wellford filed a separate opinion dissenting from the denial of rehearing *en banc*, expressing his view that the court "inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool." (App. 79a).

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS PERVASIVE ISSUES OF VITAL NATIONAL CONCERN RELATING TO RACIAL PREFERENCES IN PUBLIC EMPLOYMENT.

Although there is substantial litigation in the area of municipally imposed racial preferences in public employment,[9] this Court has dealt only peripherally with these issues in three principal cases: *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978); *United Steelworkers of America v. Weber, supra*; and *Fullilove v. Klutznik*, 448 U.S. 448 (1980). None of these cases directly addresses the pervasive issue of the applicable parameters of municipal discretion to impose racial quotas to remedy perceived past discrimination.

The U.S. Civil Rights Commission has singled out the issue of municipal authority to impose racial quotas in public employment as a principal unanswered question in affirmative action law, *see* U.S. Commission on Civil Rights, *Affirmative Action in the 1980's: Dismantling the Process of Discrimination* 28 (1981), and has cited the district court opinion in the instant case as expressing the applicable state of the law on these issues. U.S. Commission on Civil Rights, *The State of Civil Rights: 1979* 22-24 (1980). The Attorney General has certified "that the United States has determined this case to be of general public importance." (App. 46a).

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[9] *See, e.g.*, B. Sch'lei and P. Grossman, *Employment Discrimination Law* 775-870 (2d ed. 1983).

Racial preferences, particularly in promotions, substantially impact individual citizens. Unbridled racial quotas foster community divisiveness, with minority individuals,[10] whether beneficiaries or not, bearing the stigma of the unearned,[11] and innocent nonminority individuals harboring sustained resentment.[12] A resolution of the issues in this case will thus impact not only the parties herein, but also "the broader question of race relations in the City of Detroit and throughout the United States." (App. 88a).

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[10] The use of the term "minority" here is generic rather than descriptive. Blacks presently constitute a majority of the Detroit population, and for nearly a decade have controlled the political apparatus which produced and maintains the quota.

[11] Several outstanding black scholars have delivered strong indictments against governmentally imposed racial preferences and so-called "benign" discrimination. *See, e.g.*, A. Wortham, *The Other Side of Racism* (1981); T. Sowell, *Dissenting from Liberal Orthodoxy* (1976); W. Williams, *America: A Minority Viewpoint* (1982); and S. Brown, *Court-Ordered Racial Discrimination in "America's Finest City,"* 3 Lincoln Rev. 9 (1983).

[12] A 1981 comparative study reveals that white police attitudes in Detroit have deteriorated markedly since the imposition of racial quotas. Faced with limited promotional opportunities and "alienated from the political structure," 21% of the white police officers left the Department in the four year period between 1974-78, which the author characterized as a "massive turnover" of white police officers on the force. This situation is contrasted with Oakland, which does not utilize racial quotas and where white police attitudes are demonstrably better. Buzawa, *The Role of Race in Predicting Job Attitudes of Patrol Officer*, 9 J. Crim, Just. 63 (1981).

## II. JUDICIAL REVIEW OF GOVERNMENTALLY IMPOSED RACIAL PREFERENCES IS CHARACTERIZED BY CONFUSION AND CONFLICT.

No decision of this Court has established parameters in the myriad circumstances in which municipalities enact affirmative action plans. *Stotts v. Memphis Fire Dept.* (No. 82-229), 679 F.2d 541 (6th Cir. 1982), *cert. granted* — U.S. — , 51 U.S.L.W. 3871 (1983), will provide an opportunity to adjudge the authority of a federal court under Title VII to require racially preferential employee layoffs, but will leave unaddressed the constitutionality of racial promotional quotas established by municipalities purportedly seeking to remedy their own past discrimination.

This Court has never issued a majority opinion setting out the constitutional standard for reviewing racial quotas or preferences under the Equal Protection Clause. Consequently, the circuits have expressed confusion in determining proper standards in such cases.[13] The Sixth Circuit below noted the "inherent uncertainty of the law in this area" (App. 36a) and rendered its decision despite a perceived absence of agreement within this Court "on the nature of the governmental interest which must be at stake, on the finding necessary to establish the presence of that interest [and] on the standard under which the method employed to achieve that interest is to be reviewed." (App. 9a). Similarly, the Fifth Circuit, citing *Bakke,* complained that "the Justices have told us mainly that

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[13] This confusion is illustrated in *Williams v. City of New Orleans*, in which the district court denied a consent decree incorporating racial promotion quotas, 543 F. Supp. 662 (E.D. La. 1982), which denial was reversed and remanded on appeal, 694 F.2d 987 (5th Cir. 1982), and which mandate was dissolved and rehearing *en banc* granted, 694 F.2d 998 (5th Cir. 1983).

they agree to disagree." *U.S. v. City of Miami,* 614 F.2d 1322, 1337 (5th Cir. 1980). *Accord generally, e.g., Valentine v. Smith,* 654 F.2d 503, 508 (8th Cir. 1981); *Parker v. Baltimore and Ohio Railroad Co.,* 652 F.2d 1012, 1020 (D.C. Cir. 1981). As a result, conflicts among the circuits on issues presented in this case are plentiful, including the following:

A. *Promotion quotas.* The circuits disagree on the propriety of imposing racial quotas for promotions. The Fourth Circuit, in reversing a public employment promotion quota, noted that the relevant labor market for promotions is not the pool of potential employment applicants, but rather the smaller pool of experienced, qualified employees. *Hill v. Western Electric Co.,* 596 F.2d 99, 105-06 (4th Cir. 1979). And the Second Circuit, recognizing important differences between hiring and promotion quotas in terms of the degree of injuries suffered by innocent persons, reversed such a quota in *Kirkland v. New York State Department of Correctional Services,* 520 F.2d 420, 429 (2d Cir. 1975). The reasoning of the Second Circuit was specifically rejected by the trial court below (App. 195-96a) in upholding Respondents' 50/50 promotion quota. Other circuits have joined the Sixth Circuit in sustaining promotion quotas. *See E.E.O.C. v. American Telephone and Telegraph Co.,* 556 F.2d 167 (3d Cir. 1977): *U.S. v. City of Chicago,* 549 F.2d 415 (7th Cir. 1977); *Firefighters Institute for Racial Equality v. City of St. Louis,* 616 F.2d 350 (8th Cir. 1980).

B. *Less harmful alternatives.* In *Sledge v. J.P. Stevens & Co.,* 585 F.2d 625, 646-47 (4th Cir. 1978), the court reversed a remedial decree requiring hiring quotas, noting the existence of less burdensome means to achieve equal employment opportunity. The Fifth Circuit in *NAACP v. Allen,* 493 F.2d 614, 621 (5th Cir. 1974) instructed that quotas may be imposed only where less burdensome alternatives have failed. *Contrast* the instant case, in which a rigid 50/50 promotion quota was

superimposed on existing hiring quotas and admittedly nondiscriminatory promotion procedures which provided equal opportunity based on merit. While conceding that the 50/50 ratio "is unquestionably a racial preference and it unquestionably impacts against white officers," (App. 185a), the trial court made no finding that less harmful alternatives had failed to provide equal opportunity or were inadequate to remove the vestiges of past discrimination over time.

C. *Duration.* The Fifth Circuit in *NAACP v. Allen*, 493 F.2d at 621, admonished that in the narrow circumstances in which a quota is justified, it should seek "to spend itself as promptly as it can by creating a climate in which objective, neutral employment criteria can successfully operate." *Accord,* Equal Employment Opportunity Commission, *Eliminating Discrimination in Employment: A Compelling National Priority* III-3 (1979). And the Seventh Circuit recognized that failure to modify or eliminate racial quotas where they are no longer justified results in "unfairness to innocent individuals." *U.S. v. City of Chicago,* 663 F. 2d 1354, 1361 (7th Cir. 1981). The Sixth Circuit below, while terming the quota "temporary," upheld a program which will operate for at least sixteen years and not spend itself until a balance in the lieutenants' ranks consistent with the general population is reached. Given the City's goal of racial balancing, along with rapidly changing demographic patterns, it is clear that the quota cannot be fairly characterized as temporary in nature.[14]

These conflicts among the circuits are central to the question of the extent to which municipalities may offend the rights of innocent nonminority individuals in ostensibly remedying past discrimination, and thus commend themselves to this Court for resolution.

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[14] The Court noted that the 1980 census reveals that the black population is now 63% (App. 25a, n.41), and remanded the case to the district court in light of the new census figures. (App. 78a).

## III. THE DECISIONS BELOW CONFLICT IN PRINCIPLE WITH *BAKKE*, *WEBER* AND *FULLILOVE* AND SQUARELY COLLIDE WITH THE PRINCIPLE THAT THE NATURE OF THE VIOLATION MUST DETERMINE THE SCOPE OF THE REMEDY.

The Sixth Circuit sustained a sweeping 50/50 quota which places within the municipal "area of discretion" (App. 192a) the power to use racial preferences much broader than those conferred under the remedial provisions of Title VII and the permissible parameters of the Equal Protection Clause. If the ruling below is not disturbed, major cities throughout the country will, like Detroit, have (a) the power to impose class-based racial preferences without regard to whether the beneficiaries are actual victims of past discriminatory practices; (b) the ability to impose racial preferences on a racially neutral merit and seniority system which would otherwise be protected under § 703 (h) of Title VII; and (c) the ability to disregard procedural safeguard requirements for the protection of individual rights and to distort the collective bargaining system.

The result below contradicts the teachings of this Court, which although not fully dispositive of all the issues presented herein,[15] nonetheless offer sound general principles with which the decisions below conflict. The most obvious and fundamental departure from established constitutional principles

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[15] *Weber* and *Fullilove* are distinguishable in important respects. For example, *Weber* was limited in scope to a private, collectively bargained plan which the Court emphasized did not implicate the Fourteenth Amendment since no state action was involved, 443 US at 200; while *Fullilove* involved an act of Congress, with broad, constitutionally derived powers which provide unique authority to remedy past discrimination based on carefully developed findings of fact. 448 US at 472-80.

is the standard of review adopted by the Sixth Circuit. In *Bakke, supra,* Justice Powell, announcing the judgment of the Court, clearly articulated the traditional "strict scrutiny" standard of review applicable to all governmentally imposed racial classifications:

> The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color . . . . Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination. 438 US at 289-91.

Maintaining that "the Supreme Court has failed to set out a binding standard" (App. 10-11a, n. 26), the Sixth Circuit below flatly rejected strict scrutiny, choosing instead a "reasonableness" standard, holding that:

> One analysis is required when those for whose benefit the Constitution was amended . . . claim discrimination. A different analysis must be made when the claimants are not members of a class historically subjected to discrimination. (App. 11a).

Petitioners submit that this revisionist interpretation of the Fourteenth Amendment not only dictated the result in the instant case, but also creates an alarming precedent by discarding the vital principle that "if both are not accorded the same protection, then it is not equal. *Bakke,* 438 US at 290.

Announcing the judgment of the Court in *Fullilove, supra,* Chief Justice Burger confirmed that any "preferences based on racial or ethnic criteria must necessarily receive a most searching examination . . . " 448 US at 491; and Justices Stewart, Rehnquist and Stevens clearly articulated the traditional strict scrutiny standard in separate dissenting opinions. *Fullilove,* 448 US at 526, 537. The Sixth Circuit disregarded *Fullilove,* terming it "a plurality decision with little precedential value." (App. 10a). Instead, the Court below explicitly

embraced concurring and dissenting opinions in *Bakke* and *Fullilove* to ascertain applicable constitutional standards. (App. 10a).

As applied below, this standard of "reasonableness" permits the duration of the racial quota to be linked to achieving racial parity with the general population rather than the relevant labor market of qualified "minority members who would have been employed (and promoted) by the governmental institution in question in the absence of discrimination." (Merritt, dissenting, App. 45a). While purporting to apply the teachings of *Weber*, the Sixth Circuit remanded for reconsideration of the 50% quota in view of the general population figure of 63% in the 1980 census. (App. 78a). This contrasts sharply with *Weber*, wherein preferential selection of craft trainees terminates as soon as the percentage of skilled black craft-workers approximates the number of minorities in the relevant labor market. 443 US at 209. Indeed, in a separate opinion dissenting from the denial of rehearing *en banc*, Circuit Judge Wellford emphasized "that the District Court, in approving the affirmative action program in question, inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool." (App. 79a).[16]

This Court has specifically noted the limited probative value of general population figures where the population at large does not possess the requisite qualifications for the job in question. *Hazelwood School District v. United States*, 433 US 299

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[16] This difference is substantial. Although the general population was 50% black in 1974, the City's relevant labor market expert estimated that absent discrimination there should have been 43 black lieutenants in 1974 out of a total of 232 lieutenants, a ratio of only 19%. The Court of Appeals does not mention this finding, but compare the number of lieutenants in the table in the opinion at App. 17a with the district court's findings at App. 143a.

(1977); *Int'l Brotherhood of Teamsters v. United States,* 431 US 324, 399 (1977). As the Court stated in *Hazelwood,*

> When special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value. 433 US at 308, n. 13.

The Sixth Circuit flatly misconstrued *Hazelwood,* concluding without any qualification that "[t]he Supreme Court has approved the use of racial composition comparisons between employers work forces and general area-wide population as probative of discrimination in employment discrimination cases . . ." (App. 32a). This misconstruction of *Hazelwood* permitted the Sixth Circuit to sustain the Board's use of general population figures in fashioning its 50/50 quota, noting with approval that the Board in choosing this figure had "simply concluded that *most police officers in the past had come from within the City and that the City was now approximately fifty percent black.*" (App. 25a, emphasis in original).[17]

As Justice Powell made clear in *Bakke,* 438 U.S. at 307, the goal of achieving "some specified percentage of a particular group merely because of its race or ethnic origin" is not constitutionally permissible and constitutes discrimination for its own sake. This Court has emphasized that there is neither a constitutional necessity nor right to create balances, *Milliken v. Bradley,* 418 US 717, 740-741 (1974), and the goal of racial balancing as a remedy has been specifically rejected by the Court. See *Swann v. Charlotte-Mecklenberg Bd. of Education,* 402 US 1, 24 (1971). On the contrary, where past discrimination is to be remedied, "the nature of the violation determines the scope of the remedy." *Id* at 16.

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[17] It seems obvious that a police force of mostly thirty-year career officers cannot possibly keep pace with rapidly changing demographics that went from 16% black in 1950 to 63% black in 1980.

Instead of determining whether the racial preferences were "precisely tailored" to remedy past discrimination, the Sixth Circuit embraced the use of a racial quota as a form of "redress . . . to the black population as a whole." (App. 31a). Referring specifically to past discrimination in *employment*, the Sixth Circuit held that "we do not believe that marginally increasing the percentage of black lieutenants *above the figure that would exist had hiring been non-discriminatory* is an unreasonable remedy for redressing this wrong." (*Id,* emphasis added).

No authority is cited for this "redress" rationale, which conflicts with established case law. Such "cumulative" remedies were specifically rejected in *Dayton Bd. of Educ. v. Brinkman,* 433 US 406 (1977), in which the Court instructed that race-conscious remedies may only be designed to redress the difference between the *status quo* and that which would exist absent past discrimination, based on specific fact findings.

A permissible remedy must be carefully designed to correct past discrimination with due regard for the individuals adversely affected by the remedy. Accordingly, when racial classifications impinge upon individual rights, the individual is entitled to a "determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Bakke,* 438 US at 299. In *Fullilove,* this requirement was satisfied by the existence of procedural safeguards insuring that "the use of racial and ethnic criteria is premised on assumptions rebuttable in the administrative process." 448 US at 489. *Contrast* the instant case, in which the courts below sustained the abrogation of existing procedural safeguards specified in § 7-1114 of the Detroit City Charter, providing that "any person having been passed over (for promotion) may appeal to the Board." (J.A. 1519). The district court brushed aside the lack of procedural due process in the

Board's systematic denial of a hearing to individual victims of the racial preferences, declaring that:

> [t]he purpose of individual appeals is to hear individual grievances. The white officers who were bypassed by affirmative action were complaining about Board Policy, not an injustice unique to them as individuals. (App. 218a).

The quota thus contains no procedural safeguards to insure that beneficiaries are victims of past discrimination, nor does it preclude unjust penalization of innocent individuals.[18] As a result, the Sixth Circuit, in sustaining this class-based quota, effectively rejected Chief Justice Burger's warning against any "program which seeks to confer a preferred status upon a non-disadvantaged minority," *Fullilove*, 448 US at 485; as well as the requirement that race-conscious affirmative action programs must be carefully tailored so that they do not "stray from narrow remedial justifications." *Id* at 487.

This Court has specifically noted that the "principal focus" of Title VII "is the protection of the individual employee, rather than . . . the minority group as a whole." *Connecticut v. Teal*, 457 US 440, 453-54 (1982), and that remedial efforts must be "necessarily designed . . . to restore the victims of discriminatory conduct to the position they would have occupied absent such conduct." *Milliken v. Bradley*, 418 US at 746. Indeed, Title VII expressly prohibits courts from ordering specific affirmative relief for persons who were not actual

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[18] One individual member of the Plaintiff class observed over a period of time several individual black sergeants who were first promoted to lieutenant ahead of him, and who were later promoted to inspector. (J.A. 236). At the same time, other individuals were passed over for promotion not once, but two or three times. (J.A. 65).

victims of past discrimination. *Franks v. Bowman Transportation Co.*, 424 US 747, 774 (1976).[19]

As a class-based "remedy" the 50/50 quota inherently favors some persons who have never been hindered by discriminatory employment practices,[20] yet these same individuals are preferred over other individuals in the context of a merit examination that otherwise provides an equal opportunity for each candidate to compete for promotion. This equality of opportunity is consistent with equal protection, "for once an environment where merit can prevail exists, equality of access satisfies the demand of the Constitution." *NAACP v. Allen,* 493 F 2d 614, 621 (5th Cir, 1974).

On this point, the E.E.O.C. instructs that the proper purpose of an affirmative action program "*is to overcome previous exclusion,* rather than merely to achieve numerical 'parity.'" E.E.O.C., *Eliminating Discrimination in Employment, supra,* at III-3 (emphasis in original). The Civil Rights Commission warns further that race-balancing quotas improperly change "the objectives of affirmative action plans from dismantling discriminatory processes to assuring that various groups receive specified percentages of resources and opportunities."

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[19] The district court claimed that identification of actual victims of discrimination is impossible in the instant case (App. 155a), yet proceeded to illustrate several particular cases in point, demonstrating that said efforts are indeed feasible. (156a).

[20] To the contrary, some individual beneficiaries of the lieutenants quota also benefitted from the same preference in promotions from patrolman to sergeant. (J.A. 1661, 1686, 1871).

U.S. Commission on Civil Rights, *Affirmative Action in the 1980's, supra,* at 31.[21]

Finally, while the Sixth Circuit purports to apply the teachings of *Weber,* it glosses over the role of the collective bargaining agreement which constituted the voluntary affirmative action plan upheld in that case. *See,* 443 US at 197. The instant case, conversely, involves a racial quota for promotions unilaterally imposed on a bona fide equal opportunity merit system in derogation of the state law obligation to bargain, and which includes procedural safeguards of the type described in *Fullilove.*[22]

The decision below therefore conflicts with important constitutional principles as well as statutory parameters beyond which racial quotas may not be considered "benign" in any real sense. Yet, in the absence of definitive guidance from this Court, the decisions below are necessarily viewed as the state of the law on these issues.[23] It is therefore vital that this Court review the statements of law decided below.

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[21] This Court has recognized that Congress, in § 703(h) of Title VII, specifically intended to protect seniority systems from being distorted by racial preferences. *See, Int'l Brotherhood of Teamsters v. United States,* 431 US 324 (1977). On its face, § 703(h) also protects "professionally developed" merit systems such as the promotional process in the instant case. 42 USC § 2000e-2(h).

[22] Unlike *Fullilove,* which involved an Act of Congress based on broad constitutionally derived powers, the City of Detroit is a public entity incompetent to make unilateral decisions regarding police promotions under the collective bargaining requirements of Michigan law (*see,* PERA, supra, n.1). And unlike the carefully developed findings of fact in *Fullilove,* 448 US at 472-80, the Board's "fact findings" were limited to one public meeting and no formalized findings of past discrimination. (J.A. 1129-31).

[23] *See, e.g.* Schlei & Grossman, *Employment Discrimination Law,* 854-62 (2d ed 1983).

## IV. THE CASE IS RIPE FOR REVIEW AND PRESENTS A FULLY DEVELOPED RECORD FOR THIS COURT TO DECIDE APPROPRIATE STANDARDS FOR THE REMEDIAL USE OF RACIAL PREFERENCES IN PUBLIC EMPLOYMENT.

In contrast to the unsettled records and procedural problems in other similar cases that have come before this Court,[24] this case presents to the Court a final Court of Appeals decision based on a fully developed record. Issues fully developed in the record evidence include:

(1) a comprehensive relevant labor market analysis derived from a laborious count of actual applications for employment with the Department over a three-year period, 1971-1973;

(2) an analysis of the competitive merit selection examination process, with findings on the selection rates of that process concurred in by experts for both sides;

(3) a detailed history of the affirmative action effort in the Department commencing in 1967 with special recruitment efforts and the elimination of disproportionate standards, and progressing through the use of racial preferences for hiring and, finally, in promotions;

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[24] For example, in *Minnick v. California Department of Corrections*, 452 US 105 (1981), the state court decision was held not final and certiorari was dismissed. In *Detroit Police Officers Ass'n v. Young, supra*, n. 3, the record was unsettled because the Sixth Circuit reversed the district court's decision holding the racial preferences for promotion to sergeant unconstitutional, and remanded for a new trial under standards inconsistent with the opinion.

(4) studies and testimony from police professionals on the question of race as a bona-fide occupational qualification in a modern police department; and

(5) on the issue of "benign" discrimination, expert testimony and the testimony of several individual members of the Plaintiff class, including their experiences and feelings in dealing with the racial preferences.

The record is thus one on which this Court may solidly base a decision regarding the permissible parameters of municipal racial preferences in public employment.

## CONCLUSION

The instant case presents important and topical issues of vital nationwide significance, in a manner ripe for resolution. It is respectfully urged that this Court agree to hear this case and resolve the questions presented herein.

Respectfully submitted,

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